

No. 21983

In the
United States Court of Appeal
For the Ninth Circuit

EVERT L. HAGAN,

Appellant,

vs.

THE STATE OF CALIFORNIA, et al.,

Appellees,

Respondents' Reply Brief

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Respondents' Reply Brief

Come now the respondents Harold V. Boisvert, Court Commissioner of the Superior Court of the State of California for the County of Los Angeles and William H. Levit, Judge of the Superior Court of the State of California for the County of Los Angeles, and present herewith their Reply Brief on Appeal:

STATEMENT OF FACTS

Although appellant attempts to set forth the facts of this case in a general fashion in his Opening Brief, significant facts are overlooked or underemphasized. Therefore, respondents deem it necessary to set forth the facts herein.

Appellant, as a party to litigation pending in the Superior Court of the State of California for the County of Los Angeles, stipulated in writing that Court Commissioner Harold V. Boisvert could preside as judge pro tempore for the pre-trial of the then pending lawsuit. The Pre-Trial Conference Order, dated October 2, 1963, made by Commissioner Boisvert stated that "no law and motion matters are pending or likely." When appellant made a motion for leave to file a cross-complaint, it was heard and denied on October 21, 1963, by Commissioner Boisvert as the pre-trial conference judge, pursuant to Rule 216 of the California Rules of Court (motions to modify the pre-trial conference order to be heard by the pre-trial conference judge, if available). When appellant herein filed a second motion for leave to file a cross-complaint, it was transferred again to Commissioner Boisvert, as pre-trial conference judge, on November 22, 1963, but over appellant's objection, by respondent Judge Levit. The latter indicated that the motion of appellant seemed to be a renewal of the same motion theretofore heard and decided by Commission Boisvert.

When appellant appeared before Commissioner Boisvert, appellant was found in contempt for recording the proceedings on his recording equipment. Thereafter appellant was absolved of the contempt charge, but the state court made no finding as to the applicability of the stipulation (*In re Hagan*, 224 Cal. App.

2d 590). Appellant's subject action under the federal Civil Rights Act was dismissed below and appellant prosecutes this appeal from the said judgment of dismissal.

ARGUMENT

I

THE CHALLENGE TO COMMISSIONER BOISVERT WAS NOT TIMELY.

Appellant argues in Point I of his Opening Brief that since appellant had challenged Commissioner Boisvert under Section 170.6 California Code of Civil Procedure, that Commissioner Boisvert, therefore, lacked jurisdiction to hear the motion in question. Appellant cites for this proposition the decision of the California Court of Appeal in *Schwartzman v. Superior Court*, 231 Cal. App. 2d 195, 200, which holds that such a challenge is *not* timely made if a judge has already heard and ruled on a contested issue of law or fact in an action or proceeding (Opening Brief, p. 4). And this is precisely the situation in our case!

As pointed out in the Judgment of Dismissal from which this appeal is prosecuted (p. 2 thereof):

“On October 21, 1963, Commissioner Boisvert *heard and denied* a motion of Hagan for an order granting him leave to file a cross-complaint.”

Having thus ruled on a contested issue of *law* (similar to the *Schwartzman* case, *supra*), Hagan's attempt to disqualify Commissioner Boisvert a month later, on November 22, 1963, was *not timely made*.

Respondent Judge Levit, therefore, acted not only within his jurisdiction, but also without error, in denying appellant's request to disqualify Commissioner Boisvert.

II

THERE WAS NO CLEAR ABSENCE OF ALL JURISDICTION AS TO THE CONTEMPT MATTER.

Appellant evinces his wishful thinking as to the law applicable here by citing the *dissenting* opinion in *Pierson v. Ray*, 87 Cal. S. Ct. 1213, 18 L. ed. 2d 288. (Opening Brief, p. 7) The fact is that the above cited case stands for the oft-stated rule of law that a judicial or quasi-judicial officer is *not* liable in damages under the federal Civil Rights Act unless there is a *clear absence of all Jurisdiction* in the officer. This is plainly *not* the case here.

Judge Levit transferred the motion of appellant to Commissioner Boisvert, as judge pro tempore, on the basis that it was: (1) a matter which would modify the pre-trial order, which Commissioner Boisvert had already made; and (2) it was a repetition of a motion which Commissioner Boisvert had already ruled on. The well-reasoned decision of the court below, as set

forth in its Judgment of Dismissal filed and entered March 17, 1967, sets out the Rule (Rule 216) of the California Rules of Court which *requires* that motions to modify a pre-trial conference order be heard by the pre-trial judge. Certainly it requires no extended argument to conclude that the filing of a cross-complaint, where none existed before, would of necessity modify the pre-trial conference order. Thus, the motion, itself, was properly before Commissioner Boisvert.

Appellant goes on to cite *In re Wales* (1957) 153 Cal. App. 2d 117 for the proposition that, since Commissioner Boisvert was not appointed a judge pro tempore to hear a contempt proceeding, he had no jurisdiction to do so. But the *Wales* case deals with a *separate proceeding* as to *indirect* contempt. In our case we have a situation of *direct* contempt in the proceeding then pending. To say that a judge pro tempore has no power to keep order in his courtroom and to control the proceedings is to divest him of the very authority conferred upon him.

Admittedly, Commissioner Boisvert committed error in holding appellant herein in contempt, as found by the District Court of Appeal in *In re Hagan*, 224 Cal. App. 2d 590. But this is a hindsight judgment of an appellate court and not a determination that Commissioner Boisvert had no *jurisdiction*. As pointed out by Chief Judge Learned Hand in *Gregoire v. Biddle* (2nd Circuit, (1949) 177 F. 2d 579 at p. 581:

“It does indeed go without saying that an official, who is in fact guilty of using his powers to vent his spleen upon others, or for any other personal motive not connected with the public good, should not escape liability for the injuries he may so cause; and, if it were possible in practice to confine such complaints to the guilty, it would be monstrous to deny recovery. The justification for doing so is that it is impossible to know whether the claim is well founded until the case has been tried, and that to submit all officials, the innocent as well as the guilty, to the burden of a trial and to the inevitable danger of its outcome, would dampen the ardor of all but the most resolute, or the most irresponsible, in the un-flinching discharge of their duties. Again and again the public interest calls for action which may turn out to be founded on a mistake, in the face of which an official may later find himself hard put to it to satisfy a jury of his good faith. There must indeed be means of punishing public officers who have been truant to their duties; but that is quite another matter from exposing such as have been honestly mistaken to suit by anyone who has suffered from their errors. As is so often the case, the answer must be found in a balance between the evils inevitable in either alternative. In this instance it has been thought in the end better to leave unredressed the wrongs done by dishonest officers than to subject those who try to do their duty to the constant dread of retaliation. Judged as *res nova*, we should not hesitate to follow the path laid down in the books.”

The 1880 decision of the U.S. Supreme Court in *Ex parte Virginia*, 100 US 667, upon which appellant appears to rely so heavily (Opening Brief, p. 7), has no applicability here. That case was a mandamus action, not one for damages against a judicial officer.

III

APPELLANT'S ATTACK ON JUDICIAL IMMUNITY IS UNJUSTIFIED.

Appellant attacks the principle of judicial immunity expressed by *Pierson v. Ray*, *supra*, and other cases, by stating that it has:

“... created a new race of supermen. We have a group of men in this United States who are immune from any liability created by any tort committed by them.” (Opening Brief, p. 13)

This, of course, is nonsense. A judicial officer is only immune to suit for his judicial acts and only then when there is no clear absence of all jurisdiction. *Sires v. Cole* (9th Circuit 1963) 293 F. 2d 756, 761.

As pointed out in *Gregoire v. Biddle*, *supra*, it would dampen the ardor of all but the most resolute of judges to subject those who do their duty to the constant dread of retaliation. Indeed, there would be no end to litigation if an unsuccessful litigant could always sue the judge who ruled against him.

IV

CONCLUSION

The Points and Authorities annexed to the various motions filed by respondents below, as well as those cited by the United States District Judge in his Judgment of Dismissal, filed and entered March 17, 1967, together with those cited in this Brief, in the opinion of respondents, clearly sustain the Judgment appealed from herein. Based thereon, respondents submit that the Judgment below should be affirmed.

Respectfully submitted,

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and

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Assistant County Counsel
Attorneys for Appellees.

CERTIFICATE

I certify that, in connection with the preparation of this brief, I have examined Rules 18, 19 and 39 of the United States Court of Appeals for the Ninth Circuit, and that, in my opinion, the foregoing brief is in full compliance with those rules.

DONALD K. BYRNE
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